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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 LINDA S. McCABE,) NO. EDCV 07-0066-CT
11 Plaintiff,)
12 v.) OPINION AND ORDER
13 MICHAEL J. ASTRUE,)
14 Commissioner of)
15 Social Security,)
16 Defendant.)
17

18 For the reasons set forth below, it is ordered that judgment
19 be entered in favor of defendant Commissioner of Social Security
20 ("the Commissioner") because the Commissioner's decision is
21 supported by substantial evidence and is free from material legal
22 error.

23 SUMMARY OF PROCEEDINGS

24 On January 24, 2007, plaintiff, Linda S. McCabe ("plaintiff"),
25 filed a complaint seeking judicial review of the denial of benefits
26 by the Commissioner pursuant to the Social Security Act ("the
27 Act"). The parties filed a consent to proceed before the
28 magistrate judge. On June 7, 2007, plaintiff filed a memorandum of

1 points and authorities in support of remand or reversal. On August
2 17, 2007, the Commissioner filed a brief in support of the answer.

3 SUMMARY OF ADMINISTRATIVE RECORD

4 1. Proceedings

5 On August 15, 2002, plaintiff filed an application for
6 Supplemental Security Income ("SSI") benefits, alleging disability
7 since April 1, 2002, due to carpal tunnel syndrome and hepatitis
8 C.¹ (TR 57-59, 66).² The application was denied initially and upon
9 reconsideration and after a hearing before the Administrative Law
10 Judge ("ALJ"). (TR 10-19, 30-33, 37-41).

11 Plaintiff then filed a complaint in case number EDCV 04-1398-
12 CT seeking judicial review of the Commissioner's decision. On
13 April 5, 2005, the court issued an order in case number EDCV 04-
14 1398 remanding the matter back to the Commissioner, (TR 471-82),
15 and, pursuant to the court's order, the Appeals Council remanded
16 the case back to the ALJ. (TR 483).

17 On September 28, 2005, after the remand, plaintiff,
18 represented by an attorney, appeared and testified before the ALJ.
19 (TR 657-76). A vocational expert ("VE") also testified. On
20 October 20, 2005, the ALJ issued a decision that plaintiff was not
21 disabled, because she is capable of performing a limited range of
22 light work and, given that residual functional capacity ("RFC"),

23
24 ¹The Administrative Law Judge concluded that plaintiff's
25 carpal tunnel syndrome, hepatitis C, and depression constitute
26 severe impairments as that term is defined under the Act. (See
27 TR 397).

28 ²"TR" refers to the transcript of the record of
administrative proceedings in this case and will be followed by
the relevant page number(s) of the transcript.

1 plaintiff can perform jobs that exist in significant numbers in the
 2 national economy. (TR 394-402). The decision complied with this
 3 court's directions in the remand order.

4 Plaintiff subsequently sought judicial review of the
 5 Commissioner's decision in this court.

6 2. Summary Of The Evidence

7 The ALJ's October 20, 2005 decision can be found at pages 394-
 8 402 of the administrative record and, except as otherwise noted,
 9 materially summarizes the evidence in the case.

10 PLAINTIFF'S CONTENTIONS

11 Plaintiff raises the following issues:³

- 12 1. The ALJ failed to properly consider the state agency
 13 psychiatrist's opinion regarding plaintiff's ability to
 14 perform detailed and complex tasks;
- 15 2. The ALJ improperly accepted jobs from the VE requiring the
 16 performance of detailed tasks; and,
- 17 3. The ALJ failed to properly develop the record.

18 STANDARD OF REVIEW

19 Under 42 U.S.C. §405(g), this court reviews the Commissioner's
 20 decision to determine if: (1) the Commissioner's findings are
 21 supported by substantial evidence; and, (2) the Commissioner used
 22 proper legal standards. Macri v. Chater, 93 F.3d 540, 543 (9th
 23 Cir. 1996). Substantial evidence means "more than a mere
 24 scintilla," Richardson v. Perales, 402 U.S. 389, 401 (1971), but

25
 26 ³In this case, plaintiff raises new issues that were not
 27 raised in case number CV 04-1308-CT, despite the fact that issues
 28 one and two concern evidence discussed in the ALJ's prior 2004
 decision.

1 less than a preponderance. Sandgate v. Chater, 108 F.3d 978, 980
2 (9th Cir. 1997).

3 When the evidence can reasonably support either affirming or
4 reversing the Commissioner's conclusion, however, the Court may not
5 substitute its judgment for that of the Commissioner. Flaten v.
6 Secretary of Health and Human Services, 44 F.3d 1453, 1457 (9th
7 Cir. 1995).

8 DISCUSSION

9 1. The Sequential Evaluation

10 A person is "disabled" for the purpose of receiving social
11 security benefits if he or she is unable to "engage in any
12 substantial gainful activity by reason of any medically
13 determinable physical or mental impairment which can be expected to
14 result in death or which has lasted or can be expected to last for
15 a continuous period of not less than 12 months." 42 U.S.C.
16 §423(d)(1)(A).

17 The Commissioner has established a five-step sequential
18 evaluation for determining whether a person is disabled. First, it
19 is determined whether the person is engaged in "substantial gainful
20 activity." If so, benefits are denied.

21 Second, if the person is not so engaged, it is determined
22 whether the person has a medically severe impairment or combination
23 of impairments. If the person does not have a severe impairment or
24 combination of impairments, benefits are denied.

25 Third, if the person has a severe impairment, it is determined
26 whether the impairment meets or equals one of a number of "listed
27 impairments." If the impairment meets or equals a "listed
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1 impairment," the person is conclusively presumed to be disabled.

2 Fourth, if the impairment does not meet or equal a "listed
3 impairment," it is determined whether the impairment prevents the
4 person from performing past relevant work. If the person can
5 perform past relevant work, benefits are denied.

6 Fifth, if the person cannot perform past relevant work, the
7 burden shifts to the Commissioner to show that the person is able
8 to perform other kinds of work. The person is entitled to benefits
9 only if the person is unable to perform other work. 20 C.F.R. §
10 416.920; Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

11 2. Issues

12 A. State Agency Psychiatrist's Opinion

13 Plaintiff contends that the ALJ failed to properly consider a
14 June 10, 2003 mental functional capacity assessment by the state
15 agency psychiatrist, Kenneth D. Michael, M.D. Specifically,
16 plaintiff contends that the ALJ failed to consider Dr. Michael's
17 assessment that plaintiff is moderately limited in her abilities to
18 understand and remember detailed instructions and to carry out
19 detailed instructions. (Plaintiff's Brief at 3; TR 285).

20 State agency medical consultants are "highly qualified
21 physicians" who are also "experts in Social Security disability
22 evaluation." 20 C.F.R. § 416.927(f)(2). "Findings of fact made by
23 State agency medical and psychological consultants . . . regarding
24 the nature and severity of an individual's impairment(s) must be
25 treated as expert opinion evidence of nonexamining sources." SSR
26 96-6p. ALJs "may not ignore these opinions and must explain the
27 weight given to these opinions in their decisions." Id.; see also

20 CFR § 416.927(f)(2).

Here, the ALJ did not ignore Dr. Michael's findings. Instead, the ALJ incorporated the summary and analysis of the medical evidence from the ALJ's prior 2004 decision, in which he stated:

On June 10, 2003, the State Agency Board Certified Psychiatrist concluded that the [plaintiff] was depressed and it was related to her medical condition. (Citation). Specifically, the impairments caused mild restriction of activities of daily living, moderate difficulties in maintaining social functioning, moderate difficulties in maintaining concentration, persistence or pace, and there was insufficient evidence to know if there were any episodes of decompensation of extended duration. The State Agency [psychiatrist] concluded that [plaintiff] was able to do simple repetitive tasks that were object oriented.

(TR 15, 399). This is an accurate summary of Dr. Michael's findings. (TR 271-87). The ALJ concluded that, based on the evidence of record (including Dr. Michael's findings), plaintiff could perform a limited range of light work, which included the limitation to "entry level work dealing with things rather than people."⁴ (TR 397).

Dr. Michael's assessment on the Mental Residual Functional Capacity ("Mental RFC") form that plaintiff is moderately limited

⁴At her 2005 hearing, plaintiff did not indicate that her mental impairment caused any significant limitations on her ability to work. Instead, she testified that the symptoms that are keeping her from working are pain in her hands and liver, rather than any mental limitations. (TR 508). In 2003, plaintiff was hospitalized for a depressive episode, which coincided with recent cocaine use. (TR 306-26). A plaintiff cannot receive disability benefits "if alcoholism or drug addition would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007) (quoting 42 U.S.C. § 423(d)(2)(C)). Although plaintiff used drugs just prior to the 2004 hearing, she claimed at the 2005 hearing that she had not used drugs since that time. (TR 351-52, 519).

1 in the ability to perform detailed and complex tasks is assumed
2 within his overall conclusion at the end of the form that, although
3 she may have difficulty with detailed/complex tasks, she can
4 perform limited public jobs involving simple repetitive tasks with
5 adequate pace and persistence. (See TR 287). The ALJ limited
6 plaintiff to "entry level work dealing with things rather than
7 people." (TR 397). The limitation to "entry level work"
8 (unskilled work) does not imply that plaintiff would be required to
9 perform tasks beyond the limitations assessed by Dr. Michael. See
10 20 C.F.R. § 416.968(a) ("Unskilled work is work which needs little
11 or no judgment to do simple duties that can be learned on the job
12 in a short period of time." Little vocational preparation and
13 judgment are needed for unskilled work.).⁵

14 The ALJ did not materially err in his consideration of Dr.
15 Michael's assessment.

16 B. Vocational Expert Testimony
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18 ⁵Plaintiff does not challenge the ALJ's consideration of the
19 opinions of any other doctors. The ALJ's assessment of
20 plaintiff's functional capacity is consistent with specific
21 findings of consultative psychiatric examiner Divy Kikani
22 regarding plaintiff's capacity to perform workplace functions and
23 is more restrictive than the functional assessment by Dr. Linda
24 Smith, who performed a consultative psychiatric examination of
25 plaintiff in 2002. (See TR 176, 268, 400). Findings of
26 psychiatrists who examined plaintiff consultatively constitute
27 substantial evidence supporting the ALJ's decision. See
28 Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.
2001) (findings of consultative examiner constitute substantial
evidence because they rest on the examiner's own independent
examination of plaintiff); Magallanes v. Bowen, 881 F.2d 747,
752-53 (findings of consultative examiners can constitute
substantial evidence supporting an ALJ's decision and the ALJ
need not agree with every finding of an examining physician or
testifying expert for the findings of that physician or expert to
constitute substantial evidence).

1 In a related claim, plaintiff contends the ALJ erred in
2 accepting the VE testimony concerning the jobs plaintiff could
3 perform because the DOT categorizes those jobs as requiring a
4 "reasoning level" of 2, which, plaintiff argues, would require
5 plaintiff to follow "detailed" instructions. Plaintiff contends
6 that such a requirement is inconsistent with Dr. Michael's
7 assessment that plaintiff was "moderately limited" in the ability
8 to understand, remember, and carry out detailed instructions.

9 The DOT assigns each listed job levels of general educational
10 development ("GED"), which "embrace[] those aspects of education
11 (formal and informal) which are required of the worker for
12 satisfactory job performance," and which generally are obtained
13 from elementary school, high school and college.⁶ See DOT,
14 Appendix C. The GED scale is composed of three divisions:
15 reasoning development, mathematical development and language
16 development. *Id.* Reasoning development is graded into six levels.
17 Reasoning level 2 is the second lowest level and requires the
18 employee to apply "common sense understanding" to "detailed *but*
19 *uninvolved* written or oral instructions" and to "deal with problems
20 involving a few concrete variables in or from standardized
21 situations." *Id.* (emphasis added).

22 Plaintiff seeks to equate the DOT's use of the terms "detailed
23 but uninvolved instructions" in its multiple grade scale of
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25 ⁶Plaintiff testified that she attended high school through
26 the ninth grade. (TR 355). Subsequently, she passed her high
27 school equivalency exam and attended a business college in
28 Alabama where she took word processing courses and passed the
courses. (TR 72, 355).

1 reasoning levels based on educational development with the terms
2 "detailed instructions" in the Mental RFC form. The Mental RFC
3 form, which is filled out by state agency physicians pursuant to
4 the social security regulations, breaks down the plaintiff's
5 ability to understand, remember and carry out instructions into
6 just two categories: "short and simple" and "detailed." (See TR
7 285 (mental RFC form providing summary conclusions evaluating
8 ability to understand, remember and carry out either very short and
9 simple or detailed instructions). See also 20 C.F.R. §
10 416.969a(c)(1)(iii); 20 C.F.R., part 404, subpart P, Appendix 1,
11 Listing 12.00(C)(3) ("You may be able to sustain attention and
12 persist at simple tasks but may have still have difficulty with
13 complicated tasks"). The court disagrees with plaintiff's
14 oversimplified analysis, which ignores the differences between
15 graded DOT educational development levels and the residual
16 functional capacity analysis performed pursuant to the social
17 security regulations and takes the term "detailed" out of context.
18 See Meissl v. Barnhart, 403 F.Supp.2d 981, 983-84 (C.D.Cal.
19 2005) (rejecting the argument that the DOT's use of the word
20 "detailed" in its reasoning levels scale equates with the social
21 security regulations' use of the word "detailed instructions" in
22 forming a plaintiff's mental RFC, and concluding that a limitation
23 to simple tasks performed at a routine pace did not preclude
24 plaintiff from performing jobs that required a reasoning level of
25 two).

26 Moreover, Dr. Michael found that plaintiff was only
27 "moderately" limited in her ability to carry out and understand
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1 detailed instructions and could carry out simple, routine tasks
2 with adequate persistence and pace. (TR 285). This is not
3 inconsistent with job duties that require only the application of a
4 "common sense understanding" to "detailed, *but uninvolved*"
5 instructions. DOT, Appendix C.

6 Accordingly, the ALJ did not materially err in concluding,
7 based on the VE's testimony, that plaintiff can perform unskilled
8 jobs, such as parking lot attendant or a hand packager, which the
9 DOT rates as requiring a "reasoning level" of two.

10 C. Development of the Record

11 Finally, plaintiff argues that the ALJ erred in failing to
12 fully develop the record because the ALJ did not supply a subpoena
13 to plaintiff to assist her counsel in obtaining updated medical
14 records from facilities where plaintiff received treatment.

15 The ALJ has a duty to fully and fairly develop the record.
16 Tonapetyan v. Halter, 242 F.3d 1144, 1150 (9th Cir 2001). The ALJ
17 may discharge this duty in several ways including: subpoenaing
18 plaintiff's physician; submitting written questions to the
19 physician; continuing the hearing; or leaving the record open to
20 allow plaintiff to supplement the record. Id.

21 The responsibility of the ALJ is not unlimited. The ALJ's
22 duty to "conduct an appropriate inquiry" is triggered only if the
23 evidence is ambiguous or if the ALJ determines that the record is
24 inadequate for proper evaluation. Id.

25 Here, the ALJ held the record open for "for many months" after
26 the hearing to allow plaintiff's counsel time to obtain and submit
27 additional records based on plaintiff's assertion at the hearing
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1 that she was still regularly seeing a doctor. (TR 398, 516, 526).
2 Plaintiff now contends that the ALJ should have also issued a
3 subpoena for these records.⁷ But counsel never requested that the
4 ALJ issue a subpoena, despite being told, prior to the hearing,
5 that if plaintiff wanted the ALJ to issue a subpoena, she (or
6 counsel) must submit a written request. (TR 489, 516, 526). See
7 also 20 C.F.R. § 416.1450(d)(2) (procedures for requesting that the
8 ALJ subpoena records or witnesses). Instead, when counsel reported
9 that he had not received additional records and the ALJ asked if
10 counsel could make another attempt to obtain the records, counsel
11 replied, "I'll do that." (Id.)

12 Under these circumstances, the court finds that the ALJ
13 adequately discharged his duty to develop the record in this case
14 by holding the record open for months to allow plaintiff's counsel
15 to submit additional updated records. See Tidwell v. Apfel, 161
16 F.3d 599, 602 (9th Cir. 1998) (ALJ satisfied duty to develop the
17 record by keeping it open for supplementation by submission of
18 post-hearing evidence); see also Tonapetyan v. Halter, 242 F.2d at
19 1150 (duty may be fulfilled by keeping record open to allow
20 submission of additional evidence).

21 22 CONCLUSION

23 If the evidence can reasonably support either affirming or
24 reversing the Commissioner's conclusion, the court may not

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26 ⁷Plaintiff does not identify any material evidence that
27 would be in these purported updated records. Nor does plaintiff
28 explain why she could not obtain these records directly from her
doctors who she testified she was regularly seeing.

1 substitute its judgment for that of the Commissioner. Flaten v.
2 Secretary of Health and Human Services, 44 F.3d at 1457.

3 After careful consideration of the record as a whole, the
4 magistrate judge concludes that the Commissioner's decision is
5 supported by substantial evidence and is free from material legal
6 error. Accordingly, it is ordered that judgment be entered in
7 favor of the Commissioner.

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10 DATED: 8/28/2007

Carolyn Turchin

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CAROLYN TURCHIN
12 UNITED STATES MAGISTRATE JUDGE
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